



TOWN OF WEARE
PLANNING BOARD
ZONING BOARD OF ADJUSTMENT
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Office Hours:
Monday
thru
Friday
8 AM – 4:30 PM

**ZONING BOARD OF ADJUSTMENT
MINUTES
FEBRUARY 2, 2010
(Approved as written 5/4/10)**

PRESENT: Jack Dearborn, Chairman; David Ruoff, Vice Chairman; Forrest Esenwine; June Purington; Ian McSweeney; Neal Kurk, Alternate; Malcolm Wright, Alternate; Chip Meany, Land Use Coordinator; Naomi L. Bolton, Minute Taker

GUESTS: Chris Bolton; Bruce Fillmore; Nancy Fillmore; Robert Murphy; Ginger Esenwine; Ed Lupi; Keith L. Lion; Michele Steckowych; Brent Steckowych; Eric Rinehimer; Thomas Page; Susan Arnold; Erin Brown; Michael Cook; Floyd Colburn; Thelma Tracy; John Tracy; Joseph A. Dussault; Ruth E. Dussault; Jessica Gorman; David Nelson; Kristine Davis; Andrew Davis; Dawn Palmer; Donald Mayden Koppel; Russell LeBrecht; John Nelson; Adam Rand; Cynthee Gilman; Joe Gilman; Ron Harrison; Bill Bolton.

I. CALL TO ORDER:

Chairman Dearborn called this meeting to order at 7:30 PM at the Weare Middle School Cafetorium.

II. PUBLIC HEARING:

Case #0110 Mt. William, Inc. (Owner: Chris Bolton)
Administrative Appeal, Planning Board Decision of 11-18-09
The applicant is appealing the Planning Board's decision made on November 18, 2009

Chairman Dearborn explained how the board does business and seated the board for this hearing. By seating the board he meant that all five regular members were present so that will be the five that vote on this case.

Ian McSweeney stated that he has had some conversations with the applicant but nothing that relates to this case, but in the effort of full disclosure he wanted all to know and if anyone had any issues and would like him to step down he would. There were no issues from the applicant or the public, therefore Mr. McSweeney will be seated for this hearing.

Forrest Esenwine moved to accept the application; June Purington seconded the motion, all in favor. Chairman Dearborn stated that we are not going to discuss the site plan and we are not going to discuss whether this is appropriate or not. The purpose for tonight is that this use is not allowed per the zoning under commercial. They are coming in under an accessory use. They are suggesting that it is allowed. The Planning Board felt that it was outside the scope of the zoning therefore the applicant is appealing the decision.

Vice Chairman Ruoff stated that he was taking the applicant on its word and has read the paragraph regarding it. Chairman Dearborn stated that he has the minutes from the November 18th meeting in which the Planning Board made the decision.

Elwood Stagakis asked if the letter from Town counsel which is noted as privileged and confidential, is this part of the record? Chairman Dearborn explained how it got unsealed and that it is available for the public.

Bob Murphy, attorney for Mt. William stated that he is in support of this application. He also has extra copies of the November 18th minutes for anyone to see. Attorney Murphy explained that they are here on an appeal, a very narrow appeal, and solely the Planning Board's interpretation of the zoning. The Statute indicates the ZBA is the final appeal before it can go on to any further court. The Planning Board gave you the records and you then interpret the zoning ordinance provisions and send back your interpretation. November 18th was the final of a number of hearings. Planning Board voted on the regional impact and accepted it as complete. The provision of the zoning ordinance that the Planning Board applied was whether it was allowed, but narrowly only at the permitted uses, but it didn't look at all the other ways it can be allowed. Expressly applied, it is allowed by special exception allowed by variance; by RSA 155 or because it is a non-conforming use. The parcel is over 1500 acres. The property is used for mining and used on site in a number of ways. The rocks are bundled and sold. The materials are crushed and sold. Mt. William started out as a permitted use and he has been granted grandfathered status by the Board of Selectmen. It is a grandfathered legal use. The zoning use defines an accessory use as it relates to a permitted use. The Planning Board never looked at the accessory use and that it is allowed as a right. That is the question before the board tonight. They never received a notice of decision they only have the minutes. When looking at Article 4.1, accessory use, first it has to be incidental and legal to the primary use. It is very consistent with the Supreme Court rulings. What is the primary use? It is an earth products, excavating, crushing and manufacturing operation. The asphalt is going to use the product that Mt. William, Inc. is making. They take the gravel and sand they produce today and mix it with liquid asphalt and then ship it out. The gravel and sand is 94-96% of what would happen to make the asphalt in terms of whether and incidental or subordinate to the primary use. The plan they are proposing will produce 13% of their total, clearly meeting the incidental use. The 2nd part is that it has to be customary. There are 38 asphalt plants in New

Hampshire and 32 are located in gravel pits for a reason. If 94-96% of the aggregate mix has to be brought on site the economics goes up. If you put the asphalt plant in the gravel pit your material is there. There is a detergent to coat the trucks so that it doesn't stick. There is no New Hampshire case that addresses this, but other states have case law. It is the tail of the dog case. In this type of use the asphalt is customarily the primary use.

Attorney Drescher addressed a letter to the Planning Board and he has a contrary interpretation to what Mr. Murphy has. He gave the example of a garage as an accessory use. A professional office is a different use than a residence, but a home office is an accessory use.

The asphalt plant processes the material differently than a crusher. It adds the liquid asphalt but it isn't any different than the garage with an office. Attorney Murphy felt that Attorney Drescher missed the boat. The second thing about the letter is that Attorney Drescher didn't understand that Mt. William is presently crushing the asphalt products. All the statute requires is that it pertains to, or is dependent upon, the primary use. There is a dependency on the asphalt plan to the present crushing. Even if it were not an accessory use, it could be a lawful use because it is an extension of the permitted existing use. The only difference is that it will have a few pounds of liquid asphalt added and that is it. Because the Planning Board didn't consider the accessory use they feel they made a simple mistake. Because they weren't allowed to go the next step to explain their presentation of why they feel it is an accessory use, Attorney Murphy would like the zoning board to send it back down to allow them the opportunity to address it on the merits.

Attorney Murphy handed the board a copy of his filings to be reviewed.

Vice Chairman Ruoff stated that it seems in this case that your sight is one of scale. How do we police when the accessory becomes the principal use? In the future of this operation certain components may taper off and the asphalt could be more.

Attorney Murphy responded that there are reports with the state as to what is taken out under RSA 155E. The plant that they are proposing has to be permitted by the State, so that pretty much dictates how much they can make and is regulated by the State. It is just like any other zoning decision it is enforced and can be stopped by cease and desists or injunction if it is operating not as permitted.

Vice Chairman Ruoff asked if DES has built in regulations that regulate the size. He is not sure how much 13% is. Is there a regulation or is there such a thing they do have to report to DES and do they have to license the crushers. Attorney Murphy responded that they have to do quarterly reports to MSHA and then

report to DRA to pay the taxes on the product he abstracts. The business plan he doesn't think will support that.

Elwood Stagakis wanted a point of order and pointed out to the Chairman that he thought this was going to be a narrowed discussion and now we are talking about the operation.

Neal Kurk asked when incidental ceases? When 13% becomes 51%? Attorney Murphy stated that the ordinance uses "incidental" in the ordinance in several different ways. Attorney Murphy then gave a couple more examples of incidental.

Forrest Esenwine stated that the argument you put forth, that the zoning ordinance can be manipulated by the use of certain words, that in this case, something is not permitted and you have an operation of some sort, and it is a non-permitted use in that zone, since it was there before zoning, it is allowed. A person could come and try to put any type of business to a project that is there. There all kinds of ways to make it incidental.

Attorney Murphy stated that is a good question, but it is a two part question, incidental use and uses customarily associated with the primary use. 32 out of 38 asphalt plants are in gravel pits can be both an incidental use and a use customarily associated with the primary use.

Ian McSweeney asked about the 38 gravel pits in New Hampshire. It is safe to say that the percentage of homes with garages is higher than asphalt plants in gravel pits. Mr. McSweeney stated that some commercial use versus residential use would be a better example. Mr. McSweeney asked if there are other things that can be manufactured by bringing in other additives. The response was possibly concrete.

Elwood Stagakis stated that somewhere you mentioned this was exempt from zoning and grandfathered and he found none of those terms in his ordinance. Attorney Murphy stated that it is in the Weare Earth Products ordinance. Mr. Stagakis stated that in his mind it is a pre-existing use. Attorney Murphy stated that section 3A of the earth products ordinance is where the statement comes from. Mr. Stagakis asked if this was an expansion of the use. Attorney Murphy stated that an expansion is allowed and it doesn't necessarily ban it. If tomorrow the earth products ordinance was withdrawn this pit could go in and get a permit.

Approving Abutters: NONE

Disapproving Abutters: Tom Page has been listening to everything being said. The original gravel pit was for 60 acres before Chris bought it that was supposed grandfathered. Since that time the sand pit expanded and the town has expanded it to 200 acres. The new acres should not be grandfathered. In 1979 he felt the pit wasn't operational at that time. He doesn't see it as an accessory use but a

polluting use. Chairman Dearborn stated the narrow point of the meeting is, is this plant an accessory use. He agreed with the second decision it wasn't a conforming use.

John Nelson stated that he definitely doesn't see it as an accessory use, there are some other processing things that can be done. He sees it as an expansion. The argument of using the materials he feels is not an argument. A glass factory can be used with sand. It is a processing, manufacturing plant. It is not like digging from the earth and putting it in a truck. Just because it uses what is there he doesn't feel it is accessory.

Other Boards: NONE

Public At Large: David Nelson, 10 River Road, stated that his concern is at the Planning Board meetings it was stated that there wouldn't be much truck traffic, there wouldn't be much materials leaving, then the asphalt would become the primary use not an accessory use.

Eric Rinehimer, 86 Roosevelt Road, thinks the key arguments are how many asphalt plants in the state versus the number of gravel pits in the state. This is a retail operation, you can go up and buy a couple of yards of gravel. He doesn't think the average consumer is going to put asphalt in there vehicles. He felt that argument is ludicrous. It is actually a retail plant. He feels it not a reasonable argument. He doesn't feel you can have an accessory use.

Bill Bolton, stated that the argument of 38 asphalt plants versus 10,000 gravel pits it a necessity. He doesn't think there is any correlation there are as many as you need, perhaps there is need for one more in a certain area.

Raymond Harrison, 36 Roosevelt road. His understanding is that a gravel pit is finite so, if you put in an asphalt plant, that is no longer a primary use because there is no more material there. He is opposed to this as an accessory use.

Rebuttal of Applicant: Attorney Murphy on the question of whether it will pay out. It has to be dependent on the material. It would have to return to the Town. There are 1300 acres grandfathered but 1500 total acres.

Rebuttal of Approving abutters: NONE

Rebuttal of Disapproving Abutters: John Nelson stated to that point of expanding that pit to all 1500 acres that goes to the point where it is not a primary use; it has to be an accessory use. So to make more asphalt you have to sell more gravel. If the intent is to strip and mine the 1500 acres that means there is no limit on this.

Tom Page asked, how many sand pits in Town? He feels this opens the door for a lot more.

Chairman Dearborn closed the public hearing at 8:40 PM.

Vice Chairman Ruoff moved to grant the request for administrative appeal and remand this case back to the Planning Board, Ian McSweeney seconded the motion. Discussion: Forrest Esenwine stated that he keeps getting back to the incidental use. He thinks that taking it to its logical conclusion you can find an incidental use for anything located anywhere. The fact that it is not in our ordinance to allow that, and it is not specifically stated, there may be grounds for an argument, but at the very least he doesn't think it can be automatically granted as an accessory use. The next step would be a variance, or special exception. He thinks the planning board was correct and since there was nothing in the ordinance to support it they remanded it to us; he feels that is proper. Vice Chairman Ruoff stated that this is a really close case. He has set on this board for 5 years and this is not the first time he has had to deal with incidental or subordinate. There are always question as to what is incidental and subordinate. He doesn't feel it is not a permitted use. Its incidental and subordinate, if you have to bring things in from the outside to facilitate the use and that is how you distinguish from a glass factory or concrete factory. June Purington just feels that the argument to overturn a ruling should be overwhelming. She doesn't see it here. Chairman Dearborn read the zoning and the attorneys opinion and he has read the application many times and the issue gets down to the processing on the site, everything is organic to the site, but when you take it more to another level of processing you are manufacturing it, and you are yielding a different use. Manufacturing is not allowed in the commercial. To be honest with you he agrees with Mrs. Purington's point, this is best served taking another track either a variance or changing the zoning. He is advocating that it is effectively manufacturing. It is a very close call. Vote: 0 in favor and 5 opposed, therefore the motion fails.

Case #0210 James Donison & Susan Russell
Variance, Article 14, Section 14.2
The applicant is requesting permission to subdivide the lot into two
(2) lots with less area than required by the ordinance.
Tax Map 405-002 222 Quaker Street

Forrest Esenwine moved to accept the application as complete; Ian McSweeney seconded the motion. Discussion: Forrest Esenwine stated that he is opposed to the application. He doesn't believe it is proper, in the proper order, not supposed to use other forms; it is not acceptable or complete in its proper form. He would not be opposed to continue it. Vice Chairman Ruoff stated that he would agree with Mr. Esenwine. Chairman Dearborn stated that they included the 5 points form and said see attached, with another form with question typed. He struggled with this one as well. He can't make what the application is about. We do allow the applicant to come in with more information. He thinks to support the application, all the information is in front of us. He would encourage going forward tonight. Vote: 2 in favor (Dearborn and McSweeney) and 3 opposed (Purington, Esenwine, Ruoff).

Forrest Esenwine moved to continue this hearing to March 2, 2010; Ian McSweeney seconded the motion, all in favor.

III. MINUTES:

DECEMBER 8, 2009 MINUTES: Forrest Esenwine moved that these minutes be taken up at the next meeting; Vice Chairman Ruoff seconded the motion, all in favor.

IV. ADJOURNMENT:

As there was no further business to come before the board, Forrest Esenwine moved to adjourn at 9:10 PM; David Ruoff seconded the motion, all in favor.

Respectfully submitted,

Naomi L. Bolton
Minute Taker